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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-001518 06/15/2016

HONORABLE LORI HORN BUSTAMANTE

CLERK OF THE COURT
T. Nosker
Deputy

JACK LEVINE JOEL B ROBBINS

v.

HARALSON MILLER PITT FELDMAN & MCANALLY P L C PETER AKMAJIAN

MINUTE ENTRY

The court has considered the oral arguments presented as well as the following pleadings regarding Defendants' Motion to Dismiss:

- Motion to Dismiss
- Plaintiff's Response to Defendant's Motion to Dismiss
- Reply in Support of Defendant's Motion to Dismiss

Applicable Law

In reviewing a Rule 12(b)(6) Motion, the "[c]ourts must . . . assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008). "Motions to dismiss for failure to state a claim are not favored and should not be granted *unless* it appears that the plaintiff should be denied relief as a matter of law given the facts alleged." *Logan v. Forever Living Products Intern., Inc.*, 203 Ariz. 191, 193, ¶ 7, 52 P.3d 760, 762 (2002) (*Emphasis added)* (citing State ex rel. Corbin v. Pickrell, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983)). "Dismissal is appropriate under Rule 12(b)(6) only if 'as a matter of law [] plaintiffs would not be entitled to

relief under any interpretation of the facts susceptible of proof.'" *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 8, 284 P.3d 863, 867 (2012) (citing Fid. Sec. Life Ins. Co. v. State Dep't of Ins., 191 Ariz. 222, 224 ¶ 4, 954 P.2d 580, 582 (1998)).

Ariz. Sup. Ct. R. Rule 42, Rules of Prof'l Conduct ER 1.5(b) states that "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client in writing, before or within a reasonable time after commencing the representation . . . . " There are further requirements pursuant to Ariz. Sup. Ct. R. 42, Rules of Prof'l Conduct ER 1.5(c) when there is a contingency arrangement:

> A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.

Ariz. Sup. Ct. R. 42, Rules of Prof'l Conduct ER 1.5 (e), as it existed during the applicable time frame, provides that "[a] division of a fee between lawyers who are not in the same firm may be made only if: . . . the client agrees, in a writing signed by the client, to the participation of all the lawyers involved . . . ." *Id.*

"Professional discipline protects the public, the legal profession, and the justice system and deters other lawyers from engaging in like conduct." *Matter of Struthers*, 179 Ariz. 216, 226, 877 P.2d 789, 799 (1994). "[R]epresent[ing] . . . clients without written fee agreements . . . . violate[s] ER 1.5(c)." *Id.* at 222, 877 P.2d at 795. "[T]he general rule [is] that a lawyer may not obtain fees absent a contract or a statutory provision." *Valder Law Offices v. Keenan Law Firm*¸212 Ariz. 244, 252, ¶ 28, 129 P.3d 966, 974 (App. 2006). "Ethical rules . . . require written fee agreements." *Id.*

"[E]quitable relief is not available when recovery at law is forbidden because the contract is void as against public policy." *Landi v. Arkules*, 172 Ariz. 126, 136, 835 P.2d 458, 468 (1992). "[E]quity will not allow . . . compensation when the services were performed under an illegal contract." *Id.* In *Peterson,* there was a dispute between two attorneys who had an agreement regarding fee sharing but one of the attorneys was not licensed in Arizona as required by the ethical rules. *Peterson v. Anderson*, 155 Ariz. 108, 745 P.2d 166 (App. 1987). As a result of the violation of the ethical rules, the court concluded "that the fee-splitting arrangement . . . is unenforceable because it is against public policy." *Id.* at 113, 745 P.2d at 171. The court further found that the estoppel argument was without merit because "Arizona law is well-settled that the

defense of estoppel cannot be invoked against an agreement which is void as against public policy." *Id.*

Background/Analysis

In 2011 through sometime in 2013, Plaintiff, Attorney Jack Levine ("Levine"), was acting as counsel for Tom and Gloria Erhardt ("Erhardts") in a personal injury case along with Attorney Jerry Krumweide ("Krumweide "). Levine was subsequently discharged and the Erhardts eventually retained the Defendant's firm, Haralson, Miller, Pitt, Feldman & McAnally, PLC ("Haralson") through Attorney Scott Halverson. A settlement was ultimately reached and Levine asserts he is entitled to be compensated from the proceeds of the settlement for the work he performed on behalf of the Erhardts.

The Ethical Rules have made it clear that agreements regarding fees must be in writing. ER 1.5(b) requires fee agreements with clients to be in writing. It is undisputed that Levine did not have a written fee agreement with the Erhardts for a contingency fee or any other fee. ER 1.5 (e) requires division of fees between attorneys to also be in writing. It is undisputed that Levine did not have a written agreement with his then co-counsel, Krumweide, regarding the division fees. The failure to have written fee agreements in place with the Erhardts and Krumweide was a violation of the ethical rules.

Plaintiff asserts that despite the lack of a fee agreement, he is entitled to recover pursuant to *Quantum Merit*, Unjust Enrichment and Constructive Trust. Plaintiff essentially contends that he performed work on behalf of the Erhardts and deserves to be compensated for the services he provided. However, equitable relief is not available under these circumstances. The ethical rules exist, in part, in order to protect the public and our system of justice. As in *Peterson*, the violation of the ethical rules prevents any recovery for the services performed. As a result of Plaintiff having no written fee agreement as is prescribed in the ethical rules, any oral fee agreement or expected recovery for services rendered would be void pursuant to public policy and cannot be enforced.

Conclusion

According to the ethical rules, Arizona case law, and public policy, Plaintiff's case cannot move forward because it is based upon an arrangement that does not comply with the ethical rules for attorneys. Although it is unfortunate that Plaintiff may have performed legal services for which he will not be compensated, the failure to have a written fee agreement with the clients and/or co-counsel is fatal to any claim for compensation. Furthermore, public policy dictates that Plaintiff's claims in equity fail as a result of Plaintiff's failure to follow the proscribed ethical rules.

Even if the court were to assume the truth of all matters in the Complaint, Plaintiff is not entitled to relief.

IT IS ORDERED granting Defendants Haralson, Miller, Pitt, Feldman & McAnally, PLC's Motion to Dismiss.